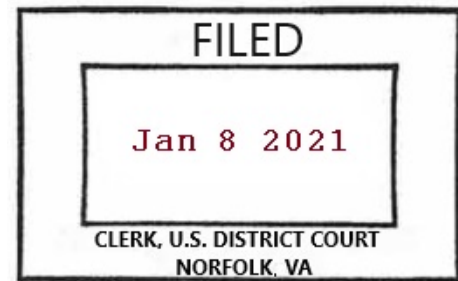


UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA



In re:
COURT OPERATIONS UNDER THE EXIGENT
CIRCUMSTANCES CREATED BY THE OUTBREAK
OF CORONAVIRUS DISEASE 2019 (COVID-19):
TEMPORARY SUSPENSION OF CRIMINAL JURY
TRIALS, GRAND JURIES, AND IN-PERSON
MISDEMEANOR, TRAFFIC, AND PETTY OFFENSE
DOCKETS

Case No. 2:20mc7

General Order No. 2021-01

The United States District Court for the Eastern District of Virginia has continued to closely monitor the outbreak of Coronavirus Disease 2019 (COVID-19), as well as the developing guidance from the Centers for Disease Control and Prevention (CDC) and local health authorities. Beginning in March of last year, the Court implemented a staged response to the nationwide public health emergency, thereby limiting operations and in-person hearings in our Courthouses in order to protect court employees and staff, litigants, counsel, other court users, and members of the public. In May of 2020, the Court began requiring the wearing of masks and social distancing in all courthouses. After a state-wide "stay at home" order issued by the Governor of Virginia was lifted, this Court began increasing Court operations in mid-June. All jury trials, however, remained suspended throughout the summer in light of the additional COVID-19 exposure risk associated with such proceedings and the need to reinvent the trial process in

order to provide adequate safeguards for mid-pandemic jury trials. After months of careful planning, culminating in the development of a modified jury trial process using retrofitted courtrooms that allow for sufficient social distancing throughout the jury selection, trial, and deliberation stages, criminal jury trials resumed in all four Divisions of this Court in September of 2020, a step taken after consideration of this Court's constitutional obligations, defendants' speedy trial rights, and the need to protect the safety of all persons involved in the jury trial process, to include summonsed jurors ordered to appear in federal court in the midst of a deadly pandemic.¹

While multiple criminal jury trials were successfully completed in our District, community conditions in the District, and the Commonwealth of Virginia, began deteriorating in November of 2020. Accordingly, on November 16, 2020, this Court issued General Order 2020-22, temporarily suspending all criminal jury trials through January 18, 2021. Additionally, on December 11, 2020, this Court issued General Order 2020-23, temporarily suspending all in-person misdemeanor, traffic, and petty offense dockets through January 18, 2021.

¹ In light of speedy trial concerns and the Court's reduced ability to safely conduct multiple simultaneous jury trials, civil jury trials remain suspended indefinitely. See Gen. Order 2020-16.

With community conditions continuing to worsen since the issuance of such General Orders, the Court has again performed a "gating criteria" analysis consistent with recommendations from the Administrative Office of the United States Courts, and again concludes that all three gating criteria (Facility Exposure Risk, Community Case Analysis, and Community Action Assessment) continue their trend in the wrong direction.

First, in the last several weeks, there has continued to be facility exposure events in our Courthouses even though many less people have been physically present during the holidays. These incidents include individuals with the U.S. Marshals Service, chambers staff, clerk's office employees, contractors, and probation officers. Additionally, criminal defendants have tested positive for COVID-19 (either before or after being in our Courthouses), and criminal defense attorneys and Assistant United States Attorneys have informed the Court of their exposure/potential exposure to COVID-19, which has impacted the scheduling of certain in-person sentencing hearings. While not a direct exposure event, the Alexandria Detention Center, which houses multiple federal inmates, has recently been in "lockdown" status based on new COVID-19 testing. The above described events have occurred in all three geographic regions of this District (Alexandria, Richmond, and Hampton Roads).

Second, it is not an exaggeration to say that COVID-19 case counts and hospitalizations across Virginia have skyrocketed during the Thanksgiving and December holiday season. When this Court suspended criminal jury trials shortly before Thanksgiving, the 7-day average of new daily cases in Virginia was approximately 1,600 cases, which at the time was the highest it had been during the pandemic. As of today, the average number of daily cases in Virginia is over 4,700, which again constitutes a record-high (the 7-day average has increased by over 1,000 in the last ten days alone, and new daily cases have exceeded 5,200 for three straight days). The number of people hospitalized in Virginia with COVID-19 has likewise experienced an unprecedented spike, with the 7-day average of hospitalizations increasing from approximately 1,300 in mid-November to over 2,850 as of the date of this Order, again the highest it has been during the pandemic.

The "percent positivity" across Virginia, and across our District, has similarly seen a sharp increase during the winter months, further confirming that the spread of this deadly disease is increasing. Specifically, multiple cities/counties immediately surrounding our Courthouses were experiencing positivity between 8% and 9% as of mid-November. As of today, both the Alexandria region and Hampton Roads have cities/counties with positivity rates nearing or exceeding 21%, while a county in the Richmond area exceeds 17% positivity. The average number of daily deaths

in Virginia is also near a record high, with more than twice as many deaths now occurring each day as compared to mid-November (nearly 400 deaths have been reported in the last ten days). Moreover, public health experts have cautioned the Court that many of the relevant metrics, most notably hospitalizations and deaths, lag behind current conditions, suggesting that ongoing community spread may be even worse than reflected by currently available data metrics.

Moving on to the third gating criteria, an assessment of "Community Action," subsequent to this Court's issuance of its mid-November General Order temporarily suspending criminal jury trials, on December 10, 2020, the Governor of Virginia issued a "modified stay at home order" requiring individuals to stay in their homes between midnight and 5:00 a.m. each night, subject to certain exceptions. Additionally, such Executive Order limits certain public and private gatherings to no more than 10 people (the limit was 250 people during the early fall and was reduced to 25 people in November before reaching the current limit in December).

After considering all of the above, and consistent with recent actions by neighboring U.S. District Courts,² this Court finds that

² Since early December, the Western District of Virginia, the District of Maryland, and the Middle District of North Carolina have all suspended all criminal jury trials through at least the end of February, 2021.

it is again appropriate to take an incremental step to extend the reduction of Court operations in order to protect litigants, employees, and the public, and to ensure that critical court operations will not be compromised through a complete shutdown. In determining the length of such extension, the Court has considered, among many other data points, the pandemic modeling performed by the University of Virginia (UVA), with the UVA Model forecasting that statewide new COVID-19 cases will peak at 38,930 per week during the week ending February 14, 2021. See <https://www.vdh.virginia.gov/content/uploads/sites/182/2021/01/VA-COVID-19-Model-Weekly-Report-2021-01-08.pdf> (last visited Jan. 8, 2021).

Criminal Jury Trials

The temporary suspension of all criminal jury trials through January 19, 2021, is hereby **extended through February 28, 2021**. This five-week extension will remain in place absent further Order from this Court. In light of speedy trial considerations, which are discussed in greater detail below, such suspension will be shortened should conditions markedly improve against the consensus predictions of health experts. Such short-term extension of the suspension of criminal jury trials is necessitated by the unprecedented spike in COVID-19 cases, hospitalizations, and deaths occurring in Virginia, and our District, over the last eight weeks.

Grand Jury Proceedings

In light of the recent spike in COVID-19 metrics in this District, a winter/holiday increase previously predicted by public health experts, and the ongoing modeling indicating that conditions will likely worsen before they improve, the Court formally **SUSPENDS all Grand Jury proceedings** in this District **through February 28, 2021**. While allowing a previously empaneled grand jury to convene is distinguishable in many ways from conducting a criminal jury trial (to include the duration of time that jurors and/or prospective jurors must utilize the same shared indoor space), conducting grand jury proceedings still frequently brings twenty or more individuals together into the same space for multiple hours, and based on the current pandemic conditions in this District, poses an unacceptable risk to the health and safety of all involved in the proceeding (and to other persons in our Courthouses). As conditions evolve and exigencies arise, the Chief Judge may make an exception to such suspension in dire circumstances; however, the expectation is that no grand juries will meet in this District through February 28, 2021. The Court notes that while a formal suspension of grand jury proceedings has not recently been in place, **grand juries have not been meeting** in this District since criminal jury trials were suspended in mid-November in light of the materially worsening state of the COVID-19 pandemic in our District.

Misdemeanor, Traffic, and Petty Offense Dockets

Considering the above-described spike in COVID-19 metrics in this District, and given the fact that our misdemeanor, traffic, and petty offense dockets involve numerous defendants, counsel, and witnesses being brought into our Courthouses, it is hereby **ORDERED** that, **all misdemeanor, traffic, and petty offense** dockets for **in-person hearings** scheduled in all Divisions of this Court through **February 28, 2021, are hereby SUSPENDED**. New dates for cases scheduled on such dockets shall be reset without the need to file any motions with this Court. The Court anticipates that the various Divisions of this Court will issue their own individual Orders identifying the names and/or dates of the specific dockets that are covered by the instant District-wide General Order.

Speedy Trial Findings

From the date of this General Order through February 28, 2021, all judges and court personnel should continue to take all reasonably available steps to reduce the number of individuals gathered (masked and socially distanced) for any live proceeding, and judges are encouraged to continue utilizing video teleconferencing to the greatest extent possible. With the Governor's December 10, 2020 Executive Order being issued after close consultation with medical experts familiar with pandemic conditions specific to the Commonwealth of Virginia, and with community conditions substantially deteriorating during the month

following the issuance of such Executive Order, this Court will continue to **limit all gatherings, including gatherings within our Courtrooms, to no more than ten individuals whenever possible**, recognizing that limited exceptions will be necessary to allow continued operation of our Court while preserving public access to our proceedings.

The decision to suspend criminal jury trials and misdemeanor, traffic, and petty offense dockets for five additional weeks was made after careful consideration of defendants', and the public's, speedy trial rights, and after consultation with judges of each Division of this Court that are familiar with both the modified physical layout of relevant courthouses and the pandemic conditions in each respective Division. As noted in prior General Orders, this Court's unwavering focus during the pandemic has been to ensure the safety of jurors, trial participants, to include defendants in misdemeanor and felony cases, and members of the public, while at the same time ensuring that every defendant has a fair trial or proceeding, with a focused jury/factfinder, and with witnesses that can be seen and heard by the factfinder notwithstanding physical or procedural pandemic modifications. Additionally, it is critical that every defendant, especially those proceeding to a jury trial, have a robust opportunity to work with counsel to prepare a defense, a vital need that has

become more and more challenging to satisfy as pandemic conditions have worsened.

Consistent with prior General Orders issued during the pandemic, the Court notes that case-specific speedy trial findings will likely prove necessary in criminal cases with a postponed jury trial, and presiding judges are encouraged to make the necessary case-specific findings and memorialize such findings in the record of any case involving a speedy trial objection. Cf. 18 U.S.C. § 3161(h)(7)(A). However, because the District-wide pandemic reaches all of our cases and impacts all of our prospective jurors and defendants, the Court hereby finds that, in addition to the periods excluded through prior General Orders, **the period of January 19, 2021, through and including February 28, 2021, is hereby excluded from the statutory speedy trial calculation pursuant to 18 U.S.C. § 3161(h)(7)(A)** for both felony charges and those misdemeanor charges for which the Speedy Trial Act is applicable. The Court makes such "ends of justice" findings after balancing the factors discussed in 18 U.S.C. § 3161(h)(7)(B), and the Court finds that the exclusion of such time from the speedy trial period is necessary to balance the health and safety of jurors and prospective jurors, presiding judges, court employees, criminal defendants, counsel, and the public, with the Court's constitutional responsibility to continue operations during the COVID-19 outbreak.

In concluding that this Court is currently unable to safely conduct criminal jury trials and in-person misdemeanor, traffic, and petty offense dockets, as well as grand jury proceedings, the Court has carefully considered the Governor's most recent Executive Order and its impact on the Court's ability to select a jury that represents a fair cross-section of the community, as well as any seated jury's ability to focus on the evidence throughout trial at a time when the risk of exposure to COVID-19 has increased so dramatically. Notably, the difficult question that presents itself to the Court is not merely whether it is "possible" to conduct a criminal jury trial, but rather, whether a fair trial that provides a criminal defendant all the necessary constitutional protections can be conducted based on the current state of the pandemic, with relevant considerations including not only the makeup of the jury, but the jury's ability, without COVID-related concerns, to focus on the evidence, see and hear the witnesses, and observe the defendant throughout the proceedings.

The Court has also placed considerable weight on the practical difficulties faced by defense counsel in adequately preparing for jury trials or in-person misdemeanor proceedings during this time of increased community spread, record hospitalizations, and increasing deaths, to include the difficulties interviewing witnesses and potential witnesses and the challenges associated with bringing witnesses into our Courthouses (to include in-

custody witnesses, expert witnesses, and witnesses from other localities who must travel). See United States v. Royce, No. 4:20cr116, 2020 WL 7059883, at *4 (D. Utah Dec. 2, 2020) ("Counsel's ability to adequately prepare for trial, including locating and consulting with witnesses, and defense counsel's ability to confer with Defendant, under these [pandemic] circumstances [are] . . . greatly reduced."). The Court has also carefully considered emerging medical information from local and nationwide health experts, to include information documenting the challenges delaying the rollout of COVID-19 vaccinations and newly emerging concerns about mutated strains of COVID-19 that at least appear to be far more contagious than previous strains. Cf. <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-emerging-variant.html> (last visited Jan. 8, 2021). The risks posed in enclosed/indoor spaces by a more contagious strain of the virus cannot be overstated, and existing distancing protocols will have to be reexamined in light of this development.

This Court's ruling today represents the next step in a thoughtful and staged incremental approach to continuances in the face of a dilemma that presents difficult choices, and no obvious solutions. The Court's best weapon in the face of such challenge is to predicate its decision on current pandemic conditions and currently available data and recommendations from the medical community. Accordingly, after careful balancing, the Court finds

that the interests of justice are best served by resuming criminal jury trials, grand jury proceedings, and in-person misdemeanor, traffic, and petty offense dockets no earlier than **March 1, 2021**. See United States v. Henry, 538 F.3d 300, 304 (4th Cir. 2008) (explaining that the factors expressly enumerated in the Speedy Trial Act, to include whether failing to grant a continuance is likely to result in a miscarriage of justice, "assist a district court in conducting the balancing required by § 3161(h)(8), that is, determining whether the need for a continuance 'outweigh[s] the best interests of the public and the defendant in a speedy trial.' § 3161(h)(8)(A)." (emphasis added)); United States v. Smith, No. 2:19cr213, 2020 WL 6063292, at *4-5 (E.D. Cal. Oct. 14, 2020) (construing 18 U.S.C. § 3161(h)(7)(B) as providing a district court "broad discretion to consider factors it deems relevant based upon the specific facts of the case and surrounding circumstances," further noting that the "ends of justice served by excluding time under the STA are higher when the court lacks the ability to safely hold a jury trial" and that there is still not any reliable treatment or cure for COVID-19); United States v. Carrillo, No. 1:19cr1991, 2020 WL 6707834, at *1 (D.N.M. Nov. 16, 2020) (discussing the "record high" COVID-19 cases and 20% positivity rate, the fact that "health risks posed by the virus will adversely impact the ability of the Court to obtain an adequate spectrum of jurors," and the court's inability to comply

with the [New Mexico] Governor's order limiting group gatherings, ultimately finding that "even if the Court could obtain an adequate spectrum of jurors and manage the safe selection of a jury in the midst of the COVID-19 pandemic, the nature of jury work hampers the Court's ability to protect the safety of those jurors as recommended by the CDC and DOH, . . . mak[ing] jury trials practically impossible, in light of the recent outbreak"); Royce, 2020 WL 7059883, at *1 (discussing a recent spike in COVID-19 cases and concluding that "[s]o long as this pandemic continues at this pace, there is no feasible way for a criminal defendant to exercise the constitutional right to jury trial" because "[t]he courts cannot compel citizens to appear for jury service - and attorneys, witnesses, defendants, and others - when assembly for a prolonged period, in an enclosed space, is unsafe"); United States v. Taylor, No. CR 18-198, 2020 WL 7264070, at *9 (D.D.C. Dec. 10, 2020) (explaining, within the context of a constitutional speedy trial analysis, that the COVID-19 pandemic is an "extraordinary phenomenon that has curbed activities across the entire planet," and concluding that COVID-19 trial delays are "fully justified and cannot be blamed on the Government." (internal quotation marks omitted)). This Court will, of course, continue to monitor current conditions in the community, and reserves the right to modify the terms of this General Order should conditions so require.

It is so ORDERED.

/s/ 

Mark S. Davis
CHIEF UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
January 8, 2021